IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918.

No. 25, Original.

EX PARTE: IN THE MATTER OF WHITNEY STEAMBOAT CORPORATION,
*Petitioner.*

**(1) Motion for Leave to File Petition for Prohibition.**
**(2) Petition for Prohibition.**
**(3) Memorandum Brief.**

ALEXANDER S. BACON,
*Attorney for Petitioner,*
46 Cedar Street,
New York.

# INDEX.

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## Motion for Permission to File Petition for Writ of Prohibition.

And now comes the petitioner, the Whitney Steamboat Corporation, by Alexander S. Bacon, its attorney and counsel, and moves for leave to file the petition for a Writ of Prohibition hereto annexed; and he further moves that a rule be entered and issued directing the District Court of the United States for the Eastern District of New York and Judge Edwin L. Garvin and all the other Judges and officers of said Court, to show cause why a Writ of Prohibition should not issue against them and each of them, in accordance with the prayer of said petition, and why said petitioner should not have such other and further relief in the premises as may be just and mete.

Dated, New York City, September 10th, 1918.

ALEXANDER S. BACON,
*Attorney and Counsel for Petitioner,*
No. 46 Cedar Street,
Borough of Manhattan,
City of New York, N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES.

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EX PARTE: IN THE MATTER
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WHITNEY STEAMBOAT CORPORATION,
*Petitioner.*

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**Petition for Prohibition.**

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To the Honorable,
The Supreme Court of the United States:

The petition of the Whitney Steamship Corporation, respectfully shows:

1. This petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and has its principal office for the transaction of business at the City of New York, N. Y.

2. This petitioner is, and at all the times hereinafter mentioned has been the owner of the steamship "H. M. Whitney", her engines &c.

3. That the District Court of the United States for the Eastern District of New York is a duly constituted Federal Court.

4. That heretofore and on and before the 17th day of April, 1918, the said steamship "H. M. Whitney", her engines &c., was in the possession and under the control of this petitioner at the City of New York, N. Y., and while so in the petitioner's custody and under its control was being repaired and was at the same time being loaded preparatory to a trip to Genoa, Italy; and on said date was removed from a pier in Brooklyn Borough to petitioner's Pier No. 63, Manhattan, City of New York, N. Y.

5. When so as aforesaid in the custody and under the control of this petitioner, at said Pier No. 63, the said steamship was attached, on April 18th, 1918, in an action brought in said District Court of the United States, Eastern District of New York, entitled "Patent Vulcanite Roofing Company, Inc., Libellant, against the Steamship 'H. M. Whitney', her engines, &c., Claimant", and a United States Marshal was put in charge thereof under said attachment.

6. Thereafter and on or about the 29th day of April, 1918, the United States Government requisitioned the use of said steamship and took possession thereof while she was still at said dock in the Borough of Manhattan, City of New York, N. Y., and thereupon the United States Government moved said steamship from Pier No. 63 to Pier No. 96 in the County of New York, and removed the cargo therefrom, putting the same in a United States warehouse. Ever since the date of said requisition, the said steamship has been in the

possession of and under the exclusive control of the United States Government, which took such possession under the authority of an Act of Congress, and said vessel is now used, and was at the times hereinafter mentioned used by said Government as a part of its military operations and not solely or in part as a merchant vessel. The United States Shipping Board is, by law and by Executive order, an agent of the Executive in the prosecution of the present war and said Shipping Board in requisitioning said vessel took over the use of and not the title to the same, and took it into the custody of the Executive.

7. Thereafter, and while said steamship was still in the custody of the United States Government, Theodore A. Crane's Sons Company, attached the same in the District Court of the Unied States for the *Southern* District of the New York, but thereafter abandoned and discontinued such action on finding that said Court had no jurisdiction in the premises. It claimed that the *Eastern* District Court had jurisdiction by virtue of the prior attachment in the Patent Vulcanite Roofing Company case.

8. Thereafter and on or about May 16th, 1918, and while said steamship was still at said Government Pier No. 96, Theodore A. Crane's Sons Company again libelled or attached said steamship, bringing such action in the District Court of the United States for the Eastern District of New York (proceeding as a Court of Admiralty and maritime jurisdiction), on the theory, as peti-

tioner is informed and believes, that the said steamship was still under the jurisdiction of said Court in that its Marshal still claimed to be in possession of said vessel under the former attachment in the action of Patent Vulcanite Roofing Company against the steamship "H. M. Whitney," her engines &c., notwithstanding the said requisition by the Sovereign Power.

9. Thereafter this petitioner, on May 29, 1918, on the return day of the process in said action of Theodore A. Crane's Sons Company, appearing specially, moved the Court to quash the said libel on the ground that no jurisdiction was obtained in attaching said steamship when the same was in the possession of and under the control of the United States Government, and used by it exclusively for military purposes. Said motion was adjourned to June 14th, 1918, and was then denied; and thereafter a motion was made to re-argue said motion to quash, and this motion was, in turn denied. Such motion to re-argue was made made on the affidavit of Alexander S. Bacon, verified July 5, 1918, and a copy of that affidavit and all the exhibits thereto and the various orders and opinions of the Court in relation thereto are hereto annexed marked exhibits 1, E and F and made part hereof, the same as if herein set forth at length, to avoid repetition; and petitioner alleges that each and every allegation contained in the said affidavit of Alexander S. Bacon, exhibit 1, is true, except that in said exhibit 1 the owner of the steamship "H. M. Whitney" is stated, by error, to be the Acme

Steamship Corporation (which is the owner of the steamship "James S. Whitney") instead of the Whitney Steamship Corporation. The attorney got the two corporations confused; said corporations have identical officers, directors and stockholders and said affidavit applies equally to the Whitney Steamship Corporation.

10. The reason assigned by the Court for refusing to grant the motion to quash the libel was because, on May 29, 1918, a double-headed order, Ex. B (*Patent Vulcanite Roofing Company v. SS. Whitney* and *Crane Sons Co. v. SS. Whitney*) had been entered on motion of the atorney for the Shipping Board, consented to by the attorneys for the two libellants, authorizing the Marshal to appoint the master of the SS. Whitney to act as Deputy Marshal, and directing him to turn back the steamer to the Marshal when the United States (U. S. Shipping Board) should be through with it.

This order was entered without notice to and without the knowledge or consent of the owner; nevertheless this self-made, court-made order, is made the basis of the Court's jurisdiction. The Court even denied the right of the owner to move to quash for want of jurisdiction. (See Exhibits E and F.)

All of this appears in exhibit 1, and its exhibits, and exhibits E and F, which include the orders and opinions of the Court.

11. About August 19, 1918, after this petition had been first prepared, petitioner learned of the

entry of judgment by default in said action of Theodore Crane's Sons Company against Steamship "H. M. Whitney", through a copy letter written by the attorneys for the libellant to Mr. Little, counsel for the Shipping Board, a copy of which letter was sent petitioner by the libellant's attorneys. A copy of this letter is hereto annexed marked exhibit G and made part thereof.

Said judgment was entered by default and without any appearance by petitioner and after the Court had refused to disclaim jurisdiction by its order of July 22, 1918, exhibit F; and petitioner alleges upon information and belief, that the United States Shipping Board threatens to pay this judgment as a lien before paying over any monthly rental to the petitioner as owner, under said requisition.

Said judgment of $260,139.28 is unjust; is far too large, being for a claim disputed as padded. Petitioner offered to arbitrate this claim by referring it to three expert accountants, who should go over the figures. Petitioner agreed to pay any claim that these arbitrators might certify as correct, but the petitioner's offer was rejected. As petitioner is informed and believes, said libellant now threatens to sell petitioner's interest in said steamship under said alleged judgment, which petitioner is advised is void.

To recapitulate:

1. April 18, 1918, the Vulcanite Company libelled the "H. M. Whitney" while it was still in the possession of the owners, the Whitney Steamship Corporation. The owner appeared

and issue was joined; a counterclaim was interposed. Concerning that attachment there is no controvery.

2. April 29, 1918, the Sovereign Power requisitioned the *use* of (not the title to), the "H. M. Whitney" and immediately utilized it, strictly for war purposes. It was not turned over to the Emergency Fleet Corporation, nor used in any mercantile pursuit, but was used by the Shipping Board itself, which is a duly authorizer agency of the *Executive*, to transport stores and to tow a derrick to France.

Petitioner claims that this requisition took the steamer out of the custody, not only of the owner, but of the United States Marshal. The Government's possession was complete, and the Marshal was ousted as completely as was the owner.

3. May 16, 1918, the Crane Company libelled the steamer while in the absolute possession of the Sovereign Power, on the theory, it is understood, that the Marshal was still in possession notwithstanding the fact that the Sovereign Power had seized the steamer and was then converting it into a towing boat to transport supplies to France and to tow a derrick at the same time.

4. May 29, 1918, on motion of the Executive (the Shipping Board) an order was entered "on consent" of two libellants in two separate actions, permitting the Marshal to make the master of the steamship his deputy.

This was, practically, a recognition of the Court's jurisdiction by the *Executive* which, thus,

practically tried to confer jurisdiction on the Court and promised to return the steamer to the Marshal when the Government should be through with it. The Executive has no power to make such consent, or to confer jurisdiction by consent.

5. June 14, 1918, the owner appearing specially to quash the libel (motion adjourned from May 29,), was confronted with the order of May 29, 1918 (entered without notice to or knowledge of the owner) and the Court claimed jurisdiction by virtue of this, its own order. The practical effect of this was that the Court assumed jurisdiction because conferred, not by law or by any action of the Law Department, but by its own order on the motion of the Executive.

6. July 22, 1918, order entered on a motion for re-argument, retaining jurisdiction, and denying a certificate that jurisdiction was the only question raised, claiming that the owner had no standing in Court to raise the question of jurisdiction. This practically cut off appeal.

QUESTIONS RAISED, DIRECTLY OR INDIRECTLY.

(a) Can a vessel be libelled when in the possession of the Sovereign Power and used exclusively in operations of war? Does the Court acquire jurisdiction *in rem* by virtue of such attachment?

(b) Did the requisition of the Sovereign Power deprive the Marshal (the Court) as well as the owner of the custody of the steamer?

(e) Can an Executive Agency of the Government (the Shipping Board) confer jurisdiction on the Court by consenting to or moving for the entry of an order, made without notice to the owner?

(d) Is the order of May 29, 1918, void?

(e) Can the order of May 29, 1918, operate to grant any jurisdiction to the Court?

(f) Had the Court any power to enter judgment by default against the vessel (practically against the owner) in the circumstances?

(g) Has the owner standing in Court to raise the question of jurisdiction?

No previous application has been made for this or any other writ of prohibition.

Dated, New York City, Sept. 10, 1918.

WHITNEY STEAMSHIP CORPORATION,
by Robert E. Miller, President.

ALEXANDER S. BACON,
*Counsel,*
46 Cedar St.,
New York City.

State of New York, }
County of New York, } ss.:

Robert E. Miller, being duly sworn, says that he is the President of the Whitney Steamship Corporation, the petitioner above named; that he has read the foregoing petition and knows the

contents thereof, that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

The reason this verification is made by deponent and not by the Whitney Steamship Corporation in person is because said Whitney Steamship Corporation is a domestic corporation, and deponent is its President.

ROBERT E. MILLER.

Sworn to before me this 10th
day of September, 1918.
V. M. TURNER,
Notary Public,
New York County, No. 76.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THEODORE A. CRANE'S SONS COMPANY, Libellant, *against* The Steamship "H. M. WHITNEY", her engines, etc., | No. 1775. |

Please take notice that upon the annexed affidavit of Alexander S. Bacon, verified July 5, 1918, and upon the bill of complaint and all the papers and proceedings heretofore had herein,

the undersigned, appearing specially for purposes of this motion only, will move the Court at a term thereof for the hearing of motions at the Post Office Building, in the Borough of Brooklyn, City of New York, on the 10th day of July, 1918, at 2 o'clock p. m. or as soon thereafter as counsel can be heard, for a reargument of the motion heretofore argued on the 14th day of June, 1918, to quash the libel herein for want of jurisdiction in the Court, and, if such reargument be granted, that the attachment herein be vacated and the libel quashed, on the grounds stated in the affidavit hereto annexed; and if said motion be denied, for a certificate of the court that the only question arising on this issue is the jurisdiction and power of the court to grant said attachment and to assume jurisdiction in this action, in the circumstances stated in said affidavit, and for such other, further order or relief as may be just.

Dated, New York City, July 5th, 1918.

ALEXANDER S. BACON,
Proctor for Acme Steamship Corporation.
Appearing specially for the sole purpose of objecting to the jurisdiction of the court and for the purposes of the motion,
46 Cedar Street,
New York City.

To
George W. McKenzie, Esq.,
Proctor for Libellant.

**Exhibit No. 1.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THEODORE A. CRANE'S SONS COMPANY, Libellant, *vs.* The Steamship "H. M. WHITNEY", her engines, etc., | |

County of New York, ss.:

Alexander S. Bacon, being duly sworn, says that he is an attorney at law, and appears specially for the Acme Steamship Corporation, which is a New York corporation, and is the owner of the steamship "H. M. Whitney", her engines, &c.;

That on or about April 17th, 1918, the said steamship was libelled in the action of the Patent Vulcanite Roofing Company, Inc., libellant, against the steamship "H. M. Whitney", claimant, and a United States Marshal was put in charge under said libel. This was while said steamship was still in the possession of its owner.

*Thereafter* and on or about the 29th day of April, 1918, the United States government requisitioned said steamship and took possession thereof, and she is now upon the high seas in the possession and under the control of the United States government, which took such possession under the

authority of an Act of Congress, and said vessel is now used, and was, at the time of the attachment in this action, used by said government as a part of its military operations, and not solely, or in part, as a merchant vessel. A copy of said requisition notice is hereto annexed and made part hereof, marked exhibit A.

*Thereafter* and on or about the 16th day of May, 1918, and while said steamship was thus in the custody and possession of, and so as aforesaid used by the United States government, Theodore A. Crane's Sons Company, the libellant in the above entitled action, libelled the said steamer. On the return of said libel, on May 29, 1918, this deponent appeared specially for the purpose of objecting to the jurisdiction of the court, and of moving to vacate said attachment and to quash said libel on the ground that, when the same was made the said steamship was in the custody and possession of the United States government, and had been taken from the custody and possession of the owners (deponent's said client) by *vis major*, and that no jurisdiction of the court could be obtained *in rem*, when the vessel attached was in the custody of the sovereign power; that said requisition not only took said vessel out of the possession and custody of the owner but the said marshal as well. Said motion to quash was adjourned, and came up for hearing before United States Judge, the Honorable Edwin L. Garvin, on June 14, 1918, at 2 o'clock p. m. at which time, on the argument, it appeared that an order had been theretofore made, jointly in this and in said Vulcanite action, a copy of which said order is

hereto annexed and marked exhibit B, and made a part hereof.

Said order, exhibit B, with its annexed affidavit of H. H. Little, dated May 29th, 1918, was made without notice to and without the knowledge or consent of this deponent or his said client, and deponent's first knowledge of such order and its entry, and his said client's first knowledge thereof, was on said hearing on June 14, 1918.

On said return day, on May 29th, 1918, and on said adjourned day and argument, on June 14, 1918, this deponent appeared specially only, for the single purpose of objecting to the jurisdiction of the court, and to move to quash said attachment or libel on the ground that this court had no jurisdiction and could acquire no jurisdiction *in rem* in this matter as against the steamship "H. M. Whitney" on May 16, 1918, at which time she was in the possession and custody of, and was then being used exclusively by, the United States government for the purposes of the war now pending, as a part of its military operations.

Thereafter and on June 15, 1918, the said Judge Edwin L. Garvin handed down and duly filed an opinion on said motion to quash, a copy of which is hereto annexed marked exhibit C and made part hereof.

By said exhibit C it appears that the court's decision was based upon said order (said exhibit B) theretofore entered by consent of the attorneys for the libellants in the two actions in this court entitled (1) Patent Vulcanite Roofing Company, Inc. against Steamship "H. M. Whitney", claimant, and (2) this action, Theodore A. Crane's Sons

Company, libellant, against Steamship "H. M. Whitney" claimant, and upon the affidavit of Henry H. Little, attorney for the United States Shipping Board, which affidavit is practically a consent to the entry of said order. Said order is as follows:

"ORDERED that James M. Power, United States "Marshal for the Eastern District of New York be "and he is hereby *permitted* to appoint the Master "of the Steamship 'H. W. Whitney', as special "Deputy United States Marshal; and that the "said Special Deputy Marshall remain in pos- "session of said vessel *for and in behalf of the "said United States Marshal;* and that the said "vessel in such custody be turned over by him to "the United States Shipping Board *for purposes "connected with the War*, the said Special Deputy "Marshal *or his substitutes* to remain always in "the possession of said vessel; and that the said "vessel be returned to the custody of the Marshal "of this Court upon being released from said "requisition by said United States Shipping "Board." (Italics ours.)

Deponent asks that said motion to quash said libel be reargued, and if such reargument be granted, that said libel be quashed, on the ground that the said order, exhibit B, on which said decision is based, and which was first called to the attention of deponent on said argument, is itself null and void by reason of the fact that this court has no jurisdiction and no power to grant such an order; that it is a mere nullity and is void not only on account of the want of jurisdiction in the court,

but is wholly void on this motion by reason of the fact that it is not binding upon deponent's said client which had no notice of the application for said order and had no knowledge of its existence until during the argument of said motion, and no opportunity was presented on said argument to examine and digest said order and present to the court the fact that it had no power to grant any binding or valid order permitting the Marshal to appoint a deputy marshal or to transmit his powers to any other person or to permit the said steamship to go without this jurisdiction, as was contemplated and really permitted by said order.

This deponent, appearing specially for the sole purpose of objecting to the jurisdiction and moving to dismiss and quash the said libel and process, therefore asks the court to reconsider said order entered therein on the 25th day of June, 1918, denying said motion to quash (a copy of which said order is hereto annexed, marked exhibit D and made part hereof); and in the event that said motion to reargue be not granted, then that the court will grant a certificate that said order denying said motion to quash was granted on the ground that this motion was made on the sole claim by the said owner that the court was without jurisdiction and without power to grant the original process or attachment or libel in this action, and that this motion is made on the further claim by said owner that the court is without jurisdiction and power to grant the said order, exhibit B.

The said owner has not appeared generally in this action; and maintains that said requisition

took said vessel out of the custody and possession, not only of this owner, but of said marshal as well; and that said order, exhibit D, is a final order and finally disposes of the issue raised on this application.

To repeat:

The owner's position, asking for a re-argument and for an order vacating said attachment and dismissing said libel, is this:

(a) The order of May 29th, 1918, is a nullity because this court, or any other court, has no power or efficacy to grant permission to a United States Marshal to appoint a Deputy Marshal or a substitute. Only the power appointing a Marshal can appoint a Deputy, and such order is a nullity.

(b) The Federal Court has no power to permit an attached vessel to leave the jurisdiction, except under the method prescribed by law, which includes a bond, &c.

(c) Said order of May 29th, 1918, has no binding effect on this motion because, made without notice to and without the knowledge or consent of the owner which makes this motion.

(d) The said order of May 29th, being a nullity, it is not a legal foundation for the granting of the order of June 20th, 1918.

(e) Neither this court nor any court, Federal or State, has any power or jurisdiction *in rem*, nor can it acquire jurisdiction by attachment of a vessel, while such vessel is in the custody and possession of the Sovereign Power, the Government

of the United States, and while being used (as was the steamship "H. M. Whitney" when attached in this action) as a part of the said Government's military operations, and not used either solely, or in part, as a merchant vessel.

(f) The only question presented on this motion is one of jurisdiction; the libellant claims that this Court obtained jurisdiction *in rem* by attaching the steamship "H. M. Whitney" while the said vessel was in the possession of the United States Government, and used by the Government, not as a merchant vessel, but as a part of its military operations. The owner claims that the court acquired no jurisdiction at all, in such circumstances, and can acquire no such jurisdiction; and that the only question arising under this notice of motion is a question of the jurisdiction of the court.

ALEXANDER S. BACON.

Subscribed and sworn to before me
this 5th day of July, 1918.
V. M. TURNER,
Notary Public,
New York County, No. 76.

## Exhibit "A".

Washington, D. C., April 27, 1918.

W. J. Smith, Shipping Board, Custom House, N. Y.

You are hereby notified that United States Shipping Board acting under authority of Urgent Deficiencies Act Fifteenth June Nineteen Seventeen and Presidents *Executive* Order Eleventh July Nineteen Seventeen has requisitioned on behalf of United States *possession* of steamship Henry M. Whitney now lying at New York and you are hereby appointed and instructed *as agent of said United States Shipping Board* to proceed on board said steamer and take and retain possession thereof for and on behalf of United States placing copy of this order upon prominent part of vesssel making sworn return of your action in the premises. Subsequent instructions will follow regarding disposition of cargo.

UNITED STATES SHIPPING BOARD.

State of New York, }
City of Ney York, } ss.:

Pursuant to the above authority and direction, I have this 29th day of April, 1918, proceeded on board of and have taken possession *on behalf of the United States*, of the American steamship Henry M. Whitney, lying at the port of New York, and have posted a copy of this order on said steamship and delivered a copy thereof to the Officer in charge.

WM. J. SMITH.

Subscribed and sworn to before me
this 29th day of April, 1918.

WILLIAM J. SAMMON,
Certificate filed in New York County.
(Seal: Notary Public, Kings County).
(Italics ours.)

**Exhibit "B".**

At a Stated Term of the United States District Court, for the Eastern District of New York, held at the Court Rooms, in the Post Office Building in the Borough of Brooklyn, City of New York, on the 29th day of May, 1918.

Present:—Honorable EDWIN L. GARVIN,
*District Judge.*

PATENT VULCANITE ROOFING COMPANY, INC.,
Libelant,
*against*
Steamship "H. M. WHITNEY",
Claimant.

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THEODORE A. CRANE'S SONS COMPANY,
Libelant,
*against*
SAME
Claimant.

On the sub-joined consent, and on the affidavit of Henry H. Little, Esq., counsel to the United States Shipping Board, hereto annexed, *and on*

*motion of Henry H. Little, Esq.*, counsel to the United States Shipping Board, it is

Ordered that James M. Power, United States Marshal for the Eastern District of New York be and he is hereby permitted to appoint the Master of the Steamship "H. M. Whitney", as Special Deputy United States Marshal; and that the said Special Deputy Marshal *remain in possession of said vessel for and in behalf of the United States Marshal;* and that the said vessel in such custody be turned over by him to the United States Ssipping Board *for the purposes connected with the War*, the said Special Deputy Marshal or his substitutes *to remain always in the possession* of the said vessel; and that the said vessel be returned to the custody of the Marshal of this Court upon being released from said requisition by said United States Shipping Board.

(Sgd) Edwin L. Garvin,
U. S. D. J.

The form and entry of the foregoing order is hereby consented to.

(Sgd) John E. Roeser,
Proctor for Patent Vulcanite Roofing Co., Inc.

(Sgd) George W. McKenzie,
Proctor for Theodore A. Crane's Sons Co.

United States of America,
Eastern District of New York, } ss.:
County of Kings,

Henry H. Little, being personally sworn, says that he is counsel to the United States Shipping Board; that said Board requisitioned the Steamship "H. M. Whitney" on the 30th day of April, 1918 *for military purposes*, and that said steamship "H. M. Whitney" is now urgently needed by said United States Shipping Board to the carrying out of *the military program of the United States*. (Italics ours.)

(Sgd) HENRY H. LITTLE.

Sworn to before me this 29th
day of May, 1918,
(Sgd) PERCY C. B. GILKES,
Notary Public,
Kings Co., New York.

## Exhibit "C".

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

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|---|---|
| THEODORE A. CRANE'S SONS COMPANY<br>*vs.*<br>The Steamship "H. M. WHITNEY", her engines, etc., | June 15, 1918. |

GEORGE W. MCKENZIE, for libellant.
ALEXANDER S. BACON, for claimant.

Upon the return of process herein the claimant moves to set aside the attachment and to dismiss the libel on the ground that the Court is without jurisdiction to act because the vessel involved has been taken over by the United States Shipping Board.

*This Court has made an order* in two actions, of which this action is one, permitting the Marshal to employ as Special Deputy the master of the ship, who was to remain in possession for the Marshal.

Although the United States Shipping Board will undoubtedly have the *use* of the ship to such extent as it deems desirable, nevertheless I am of the opinion that *by the order referred to the Court*

*retains its jurisdiction over the boat subject to the requirements of the Shipping Board.*

The motion must *therefore* be denied. (Italics ours.)

(Sgd) EDWIN L. GARVIN,
U. S. D. J.

## Exhibit "D".

At a Stated Term of the District Court of the United States for the Eastern District of New York, held at the Court House thereof, in the Post Office Building, Borough of Brooklyn, City of New York, on the 20th day of June, 1918.

Present:—Honorable EDWIN L. GARVIN,
*District Judge.*

| | |
|---|---|
| THEODORE A. CRANE'S SONS COMPANY, Libellant, *vs.* The Steamship "H. M. WHITNEY", her engines, etc., | Order denying motion to set aside attachment, etc. |

Upon the return of the process issued against the above-named Steamship "H. M. Whitney" herein on the 29th day of May, 1918, the Claimant of the said vessel having moved to set aside the

attachment and dismiss the Libel herein on the ground that the Court was without jurisdiction to act because the said steamshnp had been taken over by the United States Shipping Board, and the argument upon the said question of jurisdiction having been adjourned to the 14th day of June, 1918, and the said motion and said question of jurisdiction having come on to be heard on the said 14th day of June, 1918.

And after hearing Alexander S. Bacon, Esq., Proctor for the Claimant of the said Steamship "H. M. Whitney", in support of said Motion, and Peter S. Carter, Esq., of Counsel for the Libellant, in opposition thereto;

And after reading and filing said Libel of Theodore A. Crane's Sons Company, *and the Order of this Court* signed by the Honorable Edwin L. Garvin and dated the 29th day of May, 1918, in the case of " Patent Vulcanite Roofing Company, Inc., against Steamship "H. M. Whitney", and "Theodore A. Crane's Sons Company against The Same";

Now, on motion of George W. McKenzie, Esq., Proctor for the Libellant, it is

Ordered that the said Motion to set aside the attachment against the said Steamship "H. M. Whitney" and dismiss the Libel of Theodore A. Crane's Sons Company against the said steamship *on the ground that this Court is without jurisdiction to act because the said steamship has been taken over by the United States Shipping Board,* be and the same is hereby denied.

(Sgd) EDWIN L. GARVIN,
U. S. D. J.

(Italics ours.)

**Exhibit "E".**

Theo. Crane's Son Co. vs S. S. "H. M. Whitney"

No new matter having been brought to the attention of the Court, the motion for re-argument is denied. The claimant asks for a certificate of the Court that the only question arising on this issue is the jurisdiction and power of the Court to grant the attachment and thus assume jurisdiction in this action. If an appeal is taken no such certificate will be made for the reason that this decision is based upon the *further* ground that the claimant has no standing to attack the validity of the attachment.

July 19, 1918.

EDWIN L. GARVIN,
U. S. D. J.

## Exhibit "F".

At a Stated Term of the District Court of the United States for the Eastern District of New York, held at the Court Rooms thereof, in the Post Office Building, Borough of Brooklyn, City of New York, on the 22nd day of July, 1918.

Present:—Honorable EDWIN L. GARVIN,
*District Judge.*

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| THEODORE A. CRANE'S SONS COMPANY, Libellant, *vs.* The Steamship "H. M. WHITNEY", her engines, etc. | Order denying motion for re-argument of motion to set aside attachment, etc. |

A Motion having come on to be heard on the 10th day of July, 1918, for a re-argument of the motion heretofore argued herein on the 14th day of June, 1918, to quash the Libel herein for want of Jurisdiction in the Court, and if such re-argument be granted that the attachment herein be vacated and the Libel quashed on the grounds stated in the affidavit of Alexander S. Bacon, Esq., annexed to the motion papers, and if such motion be denied for a certificate of the Court that the only question arising on this issue is the jurisdiction and power of the Court to grant said at-

tachment and to assume jurisdiction in this action in the circumstances stated in said affidavit;

And after hearing Alexander S. Bacon, Esq., as Proctor appearing specially for the Claimant of the said Steamship "H. M. Whitney" for the purpose only of setting aside the said attachment against the said vessel, in support of the said motion, and Peter S. Carter, of Counsel for the Libellant, in opposition thereto;

And after reading the notice of motion with due proof of service, and the affidavit of said Alexander S. Bacon, Esq., verified the 5th day of July, 1918;

Now, on motion of George W. McKenzie, Proctor for the Libellant, it is

Ordered that the said Motion of the Claimant for a re-argument of the Motion heretofore argued on the 14th day of June, 1918, to quash the Libel herein for want of jurisdiction be, and the same hereby is, denied.

And, on like motion, it is further

Ordered, that the Motion of the Claimant, if the said Motion for a re-argument should be denied, for a certificate of the Court that the only question arising on this issue is the jurisdiction and power of the Court to grant said attachment and to assume jurisdiction in this action in the circumstances stated in the Affidavit of Alexander S. Bacon, Esq., be, and the same hereby is, denied, as the decision of this Court denying said Motion for a re-argument of said Motion argued on the 14th day of June, 1908, *is based upon the further*

*ground that the claimant has no standing to attack the validity of the attachment.*

(Sgd) EDWIN L. GARVIN,
U. S. D. J.

(Italics ours.)

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**Exhibit G.**

CARTER & CARTER

New York City, August 19, 1918

Henry H. Little, Esq.
Counsel, U. S. Shipping Board
New York City

Dear Sir:

I submit as counsel for Theodore Crane's Sons Company libellant in The S.S. H. M. WHITNEY the certified copy of the final decree showing the amount of the claim with interest amounting to $258,723.44, and $1426.43 costs, amounting in all to $260,149.87. The amounts are made up as follows

| | |
|---|---|
| Total amount of claim | $369,739.90 |
| Less paid on account (Dec. and Jan. bills | 116,099.27 |
| | 253,640.33 |
| leaving a balance of | |
| Interest on $253,640.33 from April 10, 1918 (last bill work finished) to August 10, 1918 | 5,072.81 |
| | 258,713.14 |

DISBURSEMENTS.

| | | |
|---|---|---|
| Costs of Court and marshal fees custody of SS. Whitney | 130.26 | |
| Marshal fees or commission on $258,713.13 as follows | | |
| 1% on the first $5,000. and one half of one per cent on the balance. | 1,296.17 | 1,426.14 |
| | $1,426.43 | 260,139.28 |

When you have submitted this decree to Mr. Campbell Counsel to Shipping Board at Washington return it to me. I hope the counsels to the Shipping Board will arrange for the payment of the amount stated in the final decree.

Yours truly,

(Signed) PETER S. CARTER, Counsel

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

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No. , Original.

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EX PARTE: IN THE MATTER
OF
WHITNEY STEAMBOAT CORPORATION,
*Petitioner.*

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## Petitioner's Memorandum.

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STATEMENT OF FACTS.

1. On April 18, 1918, the Vulcanite Company libelled the SS. Whitney and the United States Marshal was put into possession. This attachment is not questioned.

2. On April 29, 1918, the Sovereign Power (per the United States Shipping Board, its agent) requisitioned the *use* of the SS. Whitney and put it immediately into War service, carrying supplies, and towing a derrick to France.

3. On May 16th, 1918, while the Marshal still claimed to be in charge of the vessel, notwithstanding the requisition by and the actual pos-

session of the Government, the Crane Company libelled also. Jurisdiction in this case is attacked by the owner.

4. On May 29th, 1918, on consent of the Vulcanite Company and the Crane Company, and on motion of Mr. Little, attorney for the Shipping Board, one order was entered in the two actions (without the knowledge or consent of the owner, this petitioner) *permitting* the Marshal to appoint the master of the ship his deputy, who is to return the vessel to the Marshal when the Government shall be through with it.

5. On May 28th, 1918, the owner, this petitioner, appearing specially, moved to quash the libel on the ground of want of jurisdiction; motion adjourned to June 14. Denied, on the strength of the Court's own order of May 29.

6. On July 10, 1918, petitioner moved to reconsider the denial of the motion to quash, and for a certificate that the question of jurisdiction was the only question raised on the motion. Again denied because of the said order of May 29 and because the owner had no standing in Court to raise the question of jurisdiction. Order entered July 22nd.

QUESTION: Did the Court acquire jurisdiction *in rem* by virtue of an attachment when the vessel was in the possession of the Sovereign Power and used exclusively in Military operations, and/or by vir-

tue of its own order assuming jurisdiction?

Is the owner of a vessel, or anybody for that matter, excluded from the right to raise the question of the Court's jurisdiction?

## POINT I.

### Jurisdiction *in rem* by attachment while the *res* is in the possession of the sovereign power.

That no Court can obtain jurisdiction *in rem* by attaching a ship while in the custody of the sovereign power will hardly be controverted. The SS. "Whitney" was not only in the exclusive possession, and under the exclusive control of the United States government, but it was actually in use in its military operations. The Sovereign Power had physical possession of the ship. The Shipping Board is the direct agent of the Executive, not of the Legislative or Judicial Branch of Government. The SS. "Whitney" has never been turned over to the Emergency Fleet Corporation or to any sub-agency to be used in semi-private uses.

On a recent motion before Judge Learned Hand, in the Southern District of New York, in the matter of the SS. "Florence H.", the Shipping Board filed a brief signed by Henry H. Little, Esq., its

attorney. In this brief the Board arrayed itself openly with the libellant, as in this case. We will quote freely from this brief because, on the points quoted, it states the law correctly, as we think, and because the writer, or at least one of the signers, of the brief was the same Mr. Little who signed an affidavit which was the foundation for the order of May 29, 1918, which order, in turn, later, was the foundation for the order of July 22nd, which retained jurisdiction in this case. This order of May 29th is assumed by Judge Garvin to be the foundation of the court's jurisdiction.

In the "Florence H." case, the Little brief admitted that no libel would lie when the vessel was in the custody of the Sovereign Power and that the Executive Branch of the Government (the Shipping Board) had no power to bind the Court by consent; nevertheless it claimed that that libel would lie because the "Florence H." was not in the custody of the Shipping Board, the Sovereign Power, but of the Emergency Fleet Corporation, which was a *private* corporation (although the stock was owned by the Government).

In other words, in both the "Florence H." case and in this "Whitney" case, the Shipping Board openly aided the libellant, but on diametrically opposite grounds. In the "Whitney" case the Shipping Board practically gave the court jurisdiction by moving for the order of May 29th, while in the "Florence H." case it denied its authority to consent to anything.

We adopt as our own the following statements of the law quoted from the Little brief:

"The Shipping Board and its counsel are not "desirous of pressing strongly the jurisdictional "issues. The suggestion has been filed solely for "the purpose of bringing these issues fairly be- "fore the court, in order that the court may dis- "miss the libel if it deems the requisite juris- "diction lacking *since it is not within the power "of the Shipping Board as an executive branch of "the Government to consent to the suit against the "United States or its property without authority.* "Stanley v. Schwolby, 162 U. S., 255, 270.

"The importance of these jurisdictional ques- "tions, involving the immunity of vast amounts "of ship property in the possession of the "Fleet Corporation make it highly advisable "that the entire matter be fairly brought to the "attention of the court.

* * * * * *

"There is no doubt that a vessel in possession "of a sovereign state and used for governmental "purposes is exempt from seizure. The respect "and deference due to the sovereignty of the state "and the peculiar safeguards that by tradition "are necessary *to protect the state and the public "interests from the hazards of ordinary court "process*, deters the judiciary from taking juris- "diction without the consent of the defendant "state.

"It is established by the adjudicated cases that "'the exemption from direct suit is * * * "'*without exception*', and that 'there is no dis- "'tinction between suits against the Government

"'directly and suits against its property'. The "Siren, 7 Wall, 152 154.

* * * * * *

"Even if the decisions did not establish the rule "that all property in the possession of a public "sovereign is exempt from suit, or even if the de- "cisions did not establish the less broad rule that "commerce has become a legitimate and national "object of the modern social state, still there can "be little question that the *Florence H.* which had "been chartered to and was carrying a cargo of "food for the French Government was at the time "of the collision being employed in the further- "ance of the national object.

"*Even were the Florence H. privately owned "she would, while in the possession of a public "state be immune from court process, the priv- "ileges of a public vessel being extended not only "to non-commissioned vessels* (Thomas A. Scott, "10 L. T. Rep. H. N. 726) *but to chartered vessels. "Athol* 1 *W. Rob.* 374; *Broad-Mayne* (1916) 1 *P. "D.* 64. *The Pampa*, 245 *F* 137.

* * * * * *

"This Corporation (The Emergency Fleet Cor- "poration) is an entity, separate and distinct from "the United States Shipping Board. It is a "private corporation, organized under the laws of "the District of Columbia. It is true that all of "its stock, with the exception of the qualifying "shares of the trustees, is owned by the United "States, but it is well settled that such a cor- "poration does not enjoy the immunity from suit "that is accorded a sovereign.

* * * * * *

"In view of this strong line of authority and in "view of the expressed policy of Congress in Sec- "tion 9 of the Shipping Act that all ships chart- "ered or leased from the Shipping Board should "be subject to the ordinary law and liabilities "governing merchant vessels, the Shipping Board "is not desirous of pressing any claim of sovereign "immunity *on behalf of the Fleet Corporation.*

"While the Shipping Act may not, strictly "speaking, be applicable to vessels acquired by "the Shipping Board under the Urgent Deficiency "Act, still it does express a strong public policy "against a broad extension of the sovereign im- "munity. If the Fleet Corporation were acting "directly under the powers delegated by the Presi- "dent it might be urged with some force, that it "was acting as a direct public agent and that its "possession was the possession of the United "States. It is not believed, however, that when "a private corporation which can act only through "its own agents is selected to perform public func- "tions that it is the intention that it should lose "its inherent character as a private corporation "and that its possession should be inseparate from "that of the government.

* * * * * *

"Whatever might be the case, if the Fleet Cor- "poration were exercising powers delegated by "the Urgent Deficiency Act, it would seem clear "that when, as is the case with the Florence H. "the vessel is operated by the Fleet Corporation "under a regular bare boat charter from the "Board, neither principle nor policy sanctioned a

"confusion of the Fleet Corporation's possession "with the possession of the government and the "property should be no more immune from suit in "the hands of the Fleet Corporation than in the "hands of any private corporation performing "like functions.

* * * * * *

"In view of the ease with which a vessel can "usually be released under bond and the relatively "slight likelihood of delays, it is quite question- "able whether the public interests require the "placing of all ship property in operation in the "control of the Fleet Corporation beyond the "reach of the law."

The Little brief admits the elementary fact that the "Florence H." would have been immune had she been operated by the Shipping Board direct (as was, and is, the "Whitney") but that she was not immune because operated by a private corporation called the Emergency Fleet Corporation (as the "Whitney" is not).

"No suit *in rem* can be maintained against the "property of the United States when it would be "necessary to take such property out of the pos- "session of the Government by any court or "process of the court."

*The Davis*, 77 U. S., 15, 19.

In the Siren, 74 U. S., 152, Mr. Justice Field lays down the familiar doctrine of the common law "that the sovereign cannot be sued in his own "Courts without his consent" * * * "The

"exemption from direct suit is, therefore, without "exception". This case held that "when the U. S. "*institute* a suit they waive their exemption", &c., so as to allow set-offs.

There can be no jurisdiction *in rem* unless the law can get it by actually taking over the custody of the *res*.

The claim of Crane Bros. Co. *in personam* is against the owners, not the U. S.; and no lien can be obtained by taking over the custody of the steamer out of the hands of the Sovereign.

## POINT II.

### The order of May 29 is void.

Apparently, the Court has based its jurisdiction on this order. At least, the opinion of Judge Garvin so states. How a Court can acquire jurisdiction by its own order we do not understand. If the order is void, of course, any action based on it is void.

The double-headed order, Exhibit B, is not only void but presumptuous, assuming to retain control of the steamer notwithstanding the requisition of the Sovereign Power. The Special Deputy is "to remain always in the possession of said "vessel" and he "remains in possession of said "vessel for and in behalf of the said United "States Marshal", i. e., the Judicial Branch, not the Executive Branch of Government is waging war with the "Whitney".

The Marshal condescends to let the United States use the vessel "for purposes connected "with the War" but he requires of the United States "that the said vessel be returned to the "custody of the Marshal of this Court upon being "released from said requisition by said United "States Shipping Board".

It is respectfully suggested that it is the United States Government, as a Sovereign Power, acting under the law and the order of the Executive, that has requisitioned this steamer, and not the Court, and that no single judge has power to make any order that has the force of a requisition. It is the requisition and not the Court that has taken over this ship, and it is the Sovereign Power, not the Court, that has possession.

The "Whitney" is in the custody of the Government, not of the Court.

The same Court that granted the order, exhibit B, and graciously "loaned" the "Whitney" to the United States, could vacate the order. And would the possession of the steamer be thereby taken out of the custody of the Shipping Board and returned to the Marshal?

Suppose the august Marshal, or his deputy, should turn pro-German and demand the custody of the vessel, what would happen?

We suggest that exhibit B is not only void, but wholly improper and, inasmuch as this order of May 29th is the foundation of the jurisdiction assumed by the Court, when the foundation falls, the jurisdiction falls with it.

Judge Garvin says in exhibit C

"*This Court has made an order* in two actions,
"of which this action is one, permitting the Mar-
"shal to employ as Special Deputy the master of
"the ship, *who was to remain in possession for*
"*the Marshal.*

"Although the United States Shipping Board
"will undoubtedly have the *use* of the ship to such
"extent as it deems desirable, nevertheless I am
"of the opinion that BY THE ORDER *referred*
"*to the Court* RETAINS ITS JURISDICTION *over the*
"*boat subject to the requirements of the Shipping*
"*Board.*" (Italics are ours.)

Just think of it! The Court on the consent of two libellants, who act in concert with the representative of the Executive, and unbeknown to the owner, acquires jurisdiction in an action and, by virtue of its own order apparently, thereby deprives the owner of any standing in Court to object to this secret procedure, for Judge Garvin says in Exhibit E, "The claimant has no standing "to attack the validity of the attachment."

This order is *void* for various reasons:

(A) The Executive Branch of the Government cannot consent to anything that interferes with the life or property of a citizen. Mr. Little, on whose motion this order purports to have been made, is the attorney for the United States Shipping Board, which is the agent of the President. He does not represent the Judicial Branch of our Government. The Executive has never been clothed with any of the functions of the Judiciary.

We understand that the policy of the Board—an agency of the Executive—does not always coincide with that of the Attorney General, who represents the Judicial branch of our Government. The Board, apparently, acts according to its present-day convenience, while the Attorney-General acts with reference to the law of the land which will confront him after the War as well as now.

The order was entered on the motion of the Board only, and on the consent of the *two plaintiffs* in two separate actions.

It goes without saying that the Executive branch of this Government, representing the Commander in Chief of the Navy, and having exclusive possession and control of the Steamship "Whitney" and using it exclusively in War operations—but not having title to the ship—only the use—can make no valid admission that will bind the real owner and prevent it from having "any standing to at-"tack the validity of the attachment". Stanley v. Schwolby, 162 U. S., 255, 270.

(B) This order, having been entered without notice to the owner, is void as to it, not having been entered under due process of law. This needs no argument.

(C) Court had no power to appoint a Deputy Marshal. Its consent amounts to no more than its consent to the Marshal to marry. The Court is not a License Bureau, neither has it power to appoint a Marshal or his Deputy.

(A) "It is not within the power of the Shipping "Board as an Executive Branch of the Government

"to consent to a suit against the United States "or its property without authority. Stanley v. "Schwaby, 162 U. S., 255." (From brief of Henry H. Little, Admiralty Counsel of the United States Shipping Board in H. E. Moss & Co. v. SS. Florence H.)

Mr. Justice Gray stated in *Stanley v. Schwolby*, 162 U. S., 255, at page 270:

"Neither the Secretary of War nor the Attorney "General, nor any subordinate of either, has been "authorized to waive the exemption of the United "States from judicial process, or to submit the "United States, or their property, to the juris- "diction of the court in a suit brought against "their officers. Case v. Terrell, 11 Wall, 199, 202; "Carr v. United States, 98 U. S., 433, 438; U. S. "v. Lee, 106 U. S., 197, 205."

If the Shipping Board has no authority to confer jurisdiction by consent, it certainly cannot accomplish the same purpose by moving the court for an order that it could not consent to.

(B) That this order, entered without notice to the owner, is void as to that owner, needs no discussion. When the owner moves to quash an attachment, its motion cannot be defeated because of an order of which it never had heard before.

Any judgment, decree or order of a court not founded upon due notice to the parties whose interests are affected is not voidable—it is absolutely void, as was said in the very recent case (April 12, 1915) *Riverside, etc.* v *Menefee*, 237 U. S., 189, by Chief Justice White:

> "That to condemn without hearing is re-
> "pugnant to the due process clause of the
> "14th Amendment needs nothing but state-
> "ment."

As is said in 10 Am. & Eng. Enc. Law, title "Due Process of Law," page 300:

> "*Due process of law* requires an orderly
> "proceeding adopted to the actual needs of
> "the case in which *the citizen has an oppor-*
> "*tunity to be heard and to defend,* protect
> "and enforce his rights by establishing any
> "fact which, under the law, would be *a pro-*
> "*tection to him or to his property.*"

(C) That the court which had no power to appoint a marshal, had no power to "permit" the marshal to appoint a deputy, goes without saying.

Apparently, the Court thought that because the Executive had moved to make the ship's master a Deputy Marshal and had thus consented to turn the ship back into the hands of the Marshal, the Court had thereby acquired jurisdiction and the owner had no rights, even to move the Court.

The owner is a resident of New York. The libellant can obtain jurisdiction *in personam* in a proper action.

Judge Garvin's refusing a certificate practically cut off an appeal from this void order.

However, if a Court has no jurisdiction, *it hasn't;* and anyone at any time can suggest that fact; and, if the Court erroneously insists on its jurisdiction, it is the duty of the Supreme Court to prohibit it.

In 11 Cyc., title "Courts," it is said:

(700) "The question of jurisdiction is always "open for determination, even though there may "be in the same case prior rulings of the same or "another judge sustaining the jurisdiction, and is "to be decided as regards the nature of the thing "in controversy, by the character of the suit, with- "out reference to what defenses exist."

(701) "*The court may of its own motion, even "though the question is not raised by the plead- "ings or is not suggested by counsel,* recognize the "want of jurisdiction, and it is its duty to act ac- "cordingly by staying proceedings, dismissing the "action, or otherwise noticing the defect, unless "the petition be reformed where it can be done."

(702) "Where a court is without jurisdiction "in the premises its acts and proceedings can be "of no force or validity, *nor can it by its decisions "or otherwise acquire jurisdiction* * * * "

"Again if a court of special or limited juris- "diction exceeds its powers its proceedings are "void and not merely voidable."

23 *Cyc.*, Title "Judgments", says:

(1070) "A judgment which is absolutely void is "entitled to no authority or respect, and therefore "may be impeached in collateral proceedings *by "any one with whose rights or interests it con- "flicts.*"

9 *Cyc.*, title "Contempt", says:

(10) "Disobedience of a void mandate, order, "judgment, or decree, or one issued by a court

"without jurisdiction of the subject-matter and "and parties litigant, is not contempt. But the "fact that the order is in part void does not justify "violations of the valid parts thereof."

*Kroner v. Reilly*, 63 N. Y. Supp., 527, says:

(528) "The court having no power to make the "order, it was *coram non judice* and without valid- "ity, and the receiver obtained no rights there- "under. For disobedience of such an order the "defendant cannot be adjudged guilty of con- "tempt."

In *Kamp v. Kamp*, 59 N. Y., 212, the court says, at page 216: "The want of jurisdiction makes the "order and judgment of the court, and the record "of its action *utterly void and unavailable for any "purpose, and want of juricdiction may always "be set up collaterally or otherwise.*" (Citations.)

(218) "Judgments of courts proceeding within "their jurisdiction cannot be question collaterally "or by other tribunals except upon appeal upon "the ground of mistake or error, but judgments "by courts having no jurisdiction are as no *judg- "ments*, and bind no one. A foreign judgment "may be attacked for want of jurisdiction in the "court in which it was rendered. Bank of Aus- "tralia v. Neas, 16 Q. B., 717; Ricardo v. Garcias, "12 Cl. & Fin., 368; Hoffman v. Hoffman, 6 N. Y., "30; 7 Am. Rep., 299."

## POINT III.

### Want of jurisdiction can be raised at anytime by anyone.

Should a stranger suggest to the Court that it had no jurisdiction, or should the Court discover that fact itself, it is the duty of the Court to refuse jurisdiction, even on appeal.

It is the owner that has to pay this outrageous, padded bill of this libellant, and surely the owner has standing in Court to raise the question of jurisdiction.

To be sure the owner can appear generally and raise the issue of jurisdiction while contesting the merits, but the owner has *not* appeared generally and cannot be compelled to. It has a right to take a shorter and less expensive method of raising the question.

On what theory Judge Garvin held that the owner, the one vitally interested, had no standing in Court, to raise the question of jurisdiction on the return day of the process, we cannot imagine.

## POINT IV.

### Writ of Prohibition.

We take the following from the notes to 5 Fed. Stat. Ann. (2nd Ed.):

718: "Power is certainly vested in the Supreme "Court to isssue the writ of prohibition to the "District Court, when that court is proceeding in "a case of admiralty and maritime cognizance of "which the District Court has no jurisdiction." (Citations.)

"Its office is to prevent an unlawful assumption "of jurisdiction and not to correct mere errors "and irregularities. (Citations.) * * *

"In *In re* Fasset, (1892), 142 U. S. 479, the "court said: 'A writ of prohibition is not intended " 'to take the place of exceptions to the libel for " 'insufficiency, and will issue only in case of a " '*want of jurisdiction* either of the parties or the " 'subject matter of the proceeding.' * * *

(719) "Thus it has been said: 'It is clear upon " 'reason and authority that where the case has " 'gone to sentence, and want of jurisdiction *does* " '*not appear upon the face of the proceedings,* " 'the granting of the writ, which even if of right " 'is not of course, is not obligatory upon the " 'court, and the parties applying may be pre- " 'cluded by *acquiescence* from obtaining it.' *In* " '*re* Cooper (1892), 143 U. S. 472. * * *

"Where it appears that a court whose action is "sought to be prohibited has clearly no jurisdic- "tion of the cause originally, a party who has ob- "jected to the jurisdiction *at the outset* and has "no other remedy *is entitled to a writ of prohibi- "tion as a matter of right.* But where there is "another legal remedy by appeal or otherwise, "or where the question of jurisdiction of the court

"is doubtful, or depends on facts which are not "made matter of record, the granting or refusal "of the writ is discretionary. *In re* Rice (1894), "155 U. S. 396, 15 S. Ct. 149, 39 U. S. (L. ed.) "198. * * *

(720) "'But where the court has clearly no "'jurisdiction of the suit or prosecution institut- "'ed before it, and the defendant therein has ob- "'jected to its jurisdiction at the outset, and has "'no other remedy, he is entitled to a writ of pro- "'hibition as a matter of right; and a refusal to "'grant it, where all the proceedings appear of "'record, may be reviewed on error.' See also "U. S. v. Peters (1795), 3 Dall (Pa.) 121, 1 U. S. "(L. ed.) 535. * * *

"Mr. Chief Justice Fuller said: 'The settled "'rules in reference to the writ of prohibition "'were thus laid down in *In re* Rice (1894) 155 "'U. S. 393, 402 [15 S. Ct. 149, 39 U. S. (L.ed.) "'198]; "Where it appears that the court whose 'action is sought to be prohibited had clearly 'no jurisdiction of the cause originally, or of 'some collateral matter arising therein, *a 'party who has objected to the jurisdiction 'at the outset and has no other remedy is 'entitled to a writ of prohibition as a matter 'of right.*. But where there is another legal 'remedy by appeal or otherwise, or where the 'question of the jurisdiction of the court is 'doubtful, or depends on facts which are not 'made matter of record, or where the applica- 'tion is made by a *stranger,* the granting or

'refusal of the writ is discretionary. Nor is 'the granting of the writ obligatory where the 'case has gone to sentence, and the want of 'jurisdiction does not appear upon the face 'of the proceedings.'' Smith v. Whitney '(1886), 116 U. S. 167, 173.' ''

## POINT V.

**The requisition by the Sovereign Power took the vessel out of the custody of the marshal as well as the owner.**

This would seem to be a matter of course.

It makes no difference who owned the vessel or in whose possession it was, or what liens there were upon it. The Sovereign Power siezes everything. It might have taken the title to the ship, paying its reasonable value to the owner or to lienors. If the possession of the ship had been in a tenant who held possession under a lease or charter party, it would not matter; the government takes the vessel free and clear of all liens.

The Shipping Board is to pay a monthly rental for the "Whitney". If the ownership be transferred, it does not interest the Board; it pays the monthly rental to the new owner. If Lienors intervene, the Board may pay the rental to whoever is entitled to it, or hold it for "whom it may concern" till titles or liens are straightened out in court.

We understand that the Theodore A. Crane's Sons Co. claims that its attachment is good because the "Whitney" was in the hands of the court (marshal), not the government. If the Sovereign Power took the possession out of the hands of the marshal, the libellant's theory fails.

It would seem unspeakable that the court's officer should remain in possession after requisition. He (representing the court which stands for the libellant) might thwart the war operations of the Executive.

The District Court for the Eastern District of New York has wrongfully assumed jurisdiction of the case of Theodore A. Crane's Sons Company against the SS. H. M. Whitney, her engines &c., and when this want of jurisdiction has been brought to the attention of the Court, it has wrongfully continued to assume jurisdiction. This error of judgment should be corrected by the Supreme Court.

The "James S. Whitney" also was libelled in Charleston, S. C., after requisition, and the Court acting under similar advice from the Counsel of the Shipping Board, retained jurisdiction. The law should be settled by the Supreme Court.

We respectfully ask that the petition may be filed and due process issued thereon.

Dated, New York, September 23d, 1918.

ALEXANDER S. BACON,
*Proctor for Petitioner,*
46 Cedar Street,
New York City.

-17-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918.

**No. 25, Original.**

*Ex Parte:*

IN THE MATTER

OF

WHITNEY STEAMBOAT CORPORATION,
*Petitioner.*

## RETURN TO ORDER TO SHOW CAUSE WHY WRIT OF PROHIBITION SHOULD NOT ISSUE.

The Hecla Press, 57 Warren St., N. Y. Tel. 6230 Barclay.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918.

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No. 25, ORIGINAL.

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*Ex Parte:*

IN THE MATTER

OF

WHITNEY STEAMBOAT CORPORATION,

Petitioner.

## RETURN TO ORDER TO SHOW CAUSE WHY WRIT OF PROHIBITION SHOULD NOT ISSUE.

*To the Supreme Court of the United States:*

I, EDWIN L. GARVIN, one of the Judges of the District Court of the United States for the Eastern District of New York, in obedience to the Order to Show Cause herein issued out of this Court on the 21st day of Ocober, 1918 (a certified copy of which is attached to the Petition of the Petitioner served upon me), directing the District Court of the United

States for the Eastern District of New York, Judge Edwin L. Garvin and all the other Judges and Officers of this Court to show cause why a Writ of Prohibition should not issue against them and each of them in accordance with the prayer of the Petition (but there is no prayer to the said Petition: it simply raises the question whether or not the District Court of the United States for the Eastern District of New York has jurisdiction over the Steamship *H. M. Whitney* and the Libellant, Theodore A. Crane's Sons Company), HEREBY CERTIFY and make the following return to this Honorable Court:

The said Order to Show Cause why a Writ of Prohibition should not issue against the United States District Court for the Eastern District of New York and against me and all the other Judges of the said Court, should be denied upon the following grounds:

1. I except to the granting of said rule for the reason that the petition upon which the motion therefor is based does not ask for such rule and does not pray the issuance of any Writ of Prohibition.

2. I except to the said petition as insufficient for the reason that it contains no prayer for any relief, and especially for that to be obtained by means of the extraordinary Writ of Prohibition.

3. I except to the said Petition as insufficient in that it does not allege that any action is threatened by the said District Court or the Judges or officers thereof.

4. I except to the sufficiency of said Petition for the reason that it does not pray for any relief, but propounds a number of questions to the Court which

appear upon the face of the writ to be properly answerable, if necessary to be answered, by an Appellate Court on appeal in the usual course in Admiralty causes.

And, without waiving said exceptions, I FURTHER CERTIFY and answer:

5. That it is true, as in said Petition alleged, that on April 18th, 1918, the Steamship *H. M. Whitney* was attached by the Marshal of said Court, in an action *in rem* brought by the Patent Vulcanite Roofing Company, and placed in custody of one of his deputies. It is also true that on or about the 27th day of April, 1918, the United States Shipping Board appointed W. J. Smith its agent, with instructions, under its requisition, to take possession of said steamer, which he did on April 29th, as appears from his return.

But it is also true that the Marshal was not actually dispossessed by said Smith, his deputy remaining on board in custody in his official capacity until May 29th.

It is true that on May 16th Theodore A. Crane's Sons Company filed its Libel *in rem* against said steamer in said Court, under process, in which suit the Marshal, who was then in custody of her, also attached her in that proceeding.

Therefore, on May 29th, 1918, the United States Shipping Board, by its Counsel, appeared before the Court (Judge Garvin sitting), and stated that the use of the vessel was then needed by the Government for war purposes; that the Marshal was still in custody by virtue of the writs of attachment in the Patent Vulcanite Roofing Company and Crane's Sons Company proceedings, and that they did not desire to raise an issue over the possession of the property as between two departments of the Gov-

ernment, and they moved the Court to direct the Marshal to release her. This the Court was without power to do.

No appearance having been entered on behalf of the said steamer, the Court convened the Proctors for Libellants and Counsel for the Shipping Board, and Proctors for Libellants having declined to agree to an unconditional release, consented, on motion of Counsel for the United States Shipping Board, to the entry of the Order which was signed on that day (R., p. 22, Exhibit B).

It is true that thereafter the Petitioner appeared specially by Counsel and moved the Court to quash the attachment in the Crane suit and to dismiss the libel upon the ground of want of jurisdiction, which motions, after argument, were overruled (R., pp. 25, 26). And it is true that at a subsequent date a motion to rehear and to issue a certificate was denied (R., p. 29) for the reasons stated.

But it is also true that no further proceedings were had or action taken by Petitioner, and, no answer having been filed, the cause came on in due course to be heard, and on motion of libellant a final decree *pro confesso* was entered on August 16, 1918, and the case was in this manner disposed of.

No appeal from any of these orders or from the final decree was ever applied for by petitioner, and no action in the case is now contemplated or threatened by the District Court of the United States for the Eastern District of New York or the Judges or officers thereof.

I respectfully submit that the said District Court had jurisdiction of the subject-matter of the suit, and that if petitioner was aggrieved by the action in ascertaining that it had jurisdiction of the property, also in overruling the motion, its remedy was by appeal, after final decree, and not by invoking

the aid of this Honorable Court at this late stage by means of its extraordinary Writ of Prohibition, and that, having terminated the cause by a final decree entered prior to the filing of the petition, there is no action pending for this Honorable Court to prohibit.

And, having fully answered, on behalf of mysef and the District Court of the United States for the Eastern District of New York and the other Judges and Officers thereof, I pray that said Writ may be denied, and that we may be hence dismissed.

IN WITNESS WHEREOF, I, Edwin L. Garvin, one of the Judges of the District Court of the United States for the Eastern District of New York, have hereunto set my hand and the seal of said Court this √ day of December, 1918.

(Seal of Court.)

EDWIN L. GARVIN,
*United States District Judge.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918.

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No. 25, Original.

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EX PARTE: IN THE MATTER
OF
WHITNEY STEAMSHIP CORPORATION,
*Petitioner.*

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## Petitioner's Answering Memorandum.

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ALEXANDER S. BACON,
*Petitioner's Attorney,*
No. 46 Cedar Street,
New York.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918.

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No. 25, Original.

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EX PARTE: IN THE MATTER
OF
WHITNEY STEAMSHIP CORPORATION,
*Petitioner.*

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## Petitioner's Answering Memorandum.

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Petitioner's attorney received, on the afternoon of December 5, copies of the "Return", and the "Brief" of Theo. A. Crane's Sons Company in the above proceeding.

Petitioner calls attention to the fact that by printer's error, the petitioner is named the Whitney Steam*boat* Corporation instead of the Whitney Steam*ship* Corporation. It is correctly named in the body of the petition. This error crept in after the proof had been read, and petitioner moves that the title may be amended to conform to the facts stated in the petition.

### The Return.

Neither the "Return" nor the "Brief" denies any material allegation of the petition. The "Return" dwells upon the fact that there is no

formal prayer in the petition. This omission arose from a hasty re-drawing of the last page of the petition on discovering that a judgment had been entered by default. However, this is merely technical. Nobody is deceived or taken by surprise, and the "motion" apprises the court of the purpose of the proceeding. This technicality is not noted in the Brief.

The crux of the Return seems to be found at page 3 as follows: "But it is also true that the "Marshal was not actually dispossessed by said "Smith [the representative of the Shipping "Board], who took possession of the vessel; his "deputy remaining on board in custody in his "official capacity until May 29th."

The actual facts are determined by the requisition, Exhibit A, pages 20 and 21 of the Petition. Under the terms of this exhibit, the vessel was seized by the Sovereign Power. The requisition was posted on the mast, and a copy delivered to the officer in charge (page 21).

The effect of this requisition was for the Government to take absolute possession out of the hands of any owner or lienor whatsoever. The owners got no direct notice of this requisition. No lienor got any direct notice. It is for the Supreme Court to say whether or not that requisition took an absolute or a qualified possession of the steamer. If the United States Marshal (representing really the Patent Vulcanite Roofing Company) still retained the control of the ship, there were two powers in control, the Vulcanite Company and the Government.

We do not believe that the Government, in requisitioning a steamship and taking it out of the jurisdiction of the court for actual war op-

erations, takes a qualified interest, taking it wholly out of the hands of the owner and leaving it in the hands of some lienor.

If the requisition takes absolute possession of the vessel, no matter who the owners may be, or who the leinors may be, then it goes without saying that the second libel was void, and any jurisdiction based upon that libel was also void, and neither the Executive Power of the Government nor any number of lienors could, by consent, in writing, or in open court, give the court jurisdiction.

If the original attachment was void, nothing could give the court jurisdiction in this matter, except the general appearance of the owner, and that the owner has carefully refrained from doing.

The Return says at the bottom of page 3 "that "they [the Marshal and the two libellants] did "not desire to raise an issue over the possession "of the property as between two departments of "the government, and they moved the Court to "direct the Marshal to release her. That the "Court was without power to do."

If the Court had no power to release the attachment in the Crane case, the Court had no jurisdiction whatever. Certainly the executive branch of the government had no power, by consent, to give the Court jurisdiction—especially as against the owner of the ship. The law of the land, not the Executive, confers jurisdiction on the District Court.

If the Attorney General had consented, there might have been some color of propriety in the proceeding—We do not deem that jurisdiction would even then have been acquired—but for the

Executive branch of the government, which has no more standing in court than any other creditor, to confer jurisdiction by consent, is preposterous.

We come back to the position advanced in the petition, that it is elementary that the Executive branch of the government—The Shipping Board —by its attorney, Mr. Little, had no power in law to confer jurisdiction on the Court by consenting to the entry of the order Exhibit B (pages 22, 23).

On page 4 of the Return, the facts of the petition are admitted; and it is alleged that the petitioner took no further proceedings after the motion to dismiss had been denied, and that, therefore, the petitioner was in default and judgment was entered.

As a matter of fact, the petitioner had no idea that a judgment would be taken by default, and did not know it until after a petition had been prepared and verified. There is no law that requires a party to appear generally and give a bond in a void proceeding. If a proceeding is void, it is void, and nothing done under it is of any legal value.

The Return at the bottom of page 4 states that no appeal from the orders, Exhibits D (p. 26) and F (p. 29) was taken, and no appeal taken from the final decree.

Permit us to suggest that the Court tried to cut off the appeal by refusing to certify that jurisdiction alone was involved. Moreover, whether or not a party shall appeal is a matter of its discretion. A void proceeding is void, and can be attacked directly or collaterally at any time.

Even if a void proceeding be not attacked, and the Court, at any stage of the proceedings, even

on an appeal, should conclude that the proceeding was without jurisdiction, it would be the duty of the Court to vacate these proceedigs even though no party requested it.

**The Brief.**

We do not understand that any material fact is set forth in the brief which denies any fact alleged in the petition. Certainly no important fact could be denied.

At the bottom of page 3 the Brief states that the Crane libel was issued on May 16th to the United States Marshal "who was still in possession of the said vessel under the libel filed by "the Patent Vulcanite Roofing Company, Inc."

This, we understand, is the foundation of the Crane claim to jurisdiction.

That is a question of law to be determined by the Supreme Court of the United States. If the requisition by the Sovereign takes absolute possession of the vessel, it ousts the Marshal as well as the owners. When the Shipping Board moved the steamer from pier No. 63 to its own pier No. 96 and took out the cargo and put it into its own warehouse, it assumed absolute and complete control not only of the ship but of the cargo.

If the Marshal still continued on board, he was there merely as an unauthorized visitor and without the powers of a Marshal, of which powers he had been stripped by the requisition.

At the top of page 4, the Brief quotes from the petition to the effect that the Vulcanite libel is not questioned, and states that no bond was given. We cannot understand how a bond would have been of any value, as the vessel was taken over by the government and the bond would have no effect one

way or another. The petitioner appeared generally in that suit, and interposed a counterclaim for freight moneys unpaid and for disbursements in the sum of $106,106.30, with interest. The libellant's claim was $100,000, damages for delay caused by the requisition, although they had not paid their freight moneys.

Conditions in relation to the Vulcanite libel and the Crane libel are wholly different, and they have no relation to one another.

The brief at page 4 alleges that, because no question is made of the Vulcanite attachment, levied when the steamer was in the actual possession of the owners, "that admission of the peti-"tion conclusively establishes the fact that the "United States District Court for the Eastern Dis-"trict of New York was in possession of and had "jurisdiction over the said steamship at the "time the United States Government desired the "use of the said steamship on April 29, 1918, and "that attachment was in full force and effect at "the time the said vessel was attached under the "said libel filed by Theodore A. Crane's Sons Com-"pany," &c.

Of course, this statement of the Brief is wholly an erroneous conclusion. It does not take into consideration the fact of the changed conditions caused by the requisition by the government.

The brief then states that if the petitioner wanted to litigate the claim, it could do so by giving the usual bond and putting in an answer. That fact may be true, but there is no law in the world that requires a general appearance in circumstances like these. On the other hand, the Crane company might have sued the petitioner in the State courts. The answer is that neither took the course suggested by its adversary.

On page 6 the brief says that the Un ited States Government has never claimed that it ousted the District Court from its jurisdiction ov er the said steamship. What the executive branch of the gov ernment "claims" is immaterial. Th e material point is: what was the effect of the r equisition? Did it take the possession of the stea mer out of the hands of the Marshal?

The brief at page 7 says that the o rder "con "sented to in open court by Henry H. I ittle, Esq., "counsel to the United States Shipp ing Board, "was a valid exercise of the power a nd right of "the Court to hold its original jurisd iction over "the steamship, H. M. Whitney, becau se the ves "sel was never released from attachm ent under "the libel filed by the Patent Vulcani te Roofing "Company—the first libel—by bondin g, and still "remains in the custody of the said Dis trict Court, "through the United States Marshal."

The answer to this is, of course, that the requisition took the steamer out of the cust ody of the Marshal.

Page 8 alleges that the writer knew that if the claim was not bonded, judgment would be entered and the ship sold. The answer to this is that the writer never had any idea that the libe llant would be rash enough to proceed under an abs olutely void process when the fact of want of juris diction had been pointed out to him on the two motions referred to in the petition.

The brief states at page 8, in answer to the fact of the padded claim, that two of the petitioner's own surveyors had sworn to the claim on the proceeding by default. There was no opportunity to cross-examine those surveyors. This is outside of the record, but we will say in passing that one of these surveyors, the petitioner is about to pro-

ceed against for larceny, and the surveyors have been openly charged as under the pay of the Crane Company.

At the bottom of page 8 and top of page 9, the brief suggests that the court has jurisdiction because the Shipping Board, the executive branch of the government, has never complained. "The "Government *still stands upon that order,* being "perfectly satisfied with the terms thereof."

The answer to this is that the Shipping Board is not the government, and even if it be an agent of the Executive, it has no power to confer jurisdiction upon any court, especially as against one who has never appeared in the action.

It will be noted that the Attorney General's office has never appeared in any of these proceedings, and has never even indirectly indicated that it knows of the action of the Shipping Board, or approves of its legal methods.

On page 9 et seq. the Brief answers *seriatim* the "Questions Raised, Directly or Indirectly", but it will be noted that in no single instance does the brief quote any case to sustain its answer to these "Questions Raised". They are mere statements of the attorney.

In "(e)" the Brief holds that the Court had jurisdiction *notwithstanding* the order of May 29th, and states: "The order of May 29th, 1918, "did not in any way by its terms intimate that the "Court did *not* have jurisdiction, and the United "States Government, through the United States "Shipping Board, acknowledged that the Court "*did* have jurisdiction over the said steamer, H. "M. Whitney." Of course, the order did not say that the Court had no jurisdiction. That would be ridiculous. Of course, the Shipping Board had no more power over the jurisdiction than has the

Court itself, which cannot create its own jurisdiction.

The only question is: did the Court acquire jurisdiction in the beginning?

The court "says" that it based its jurisdiction on the order (Ex. C, pp. 25-26).

This argument of the brief reminds us of the Judge's advice to the newly elected Justice of the Peace: "Decide each case. One chance out "of two you will be right. Never write an opin- "ion. One hundred chances to one you will be "wrong."

The order of May 29th was the *reason* assigned by Judge Garvin for retaining jurisdiction. Of course, the reason might be all wrong, and yet the court have jurisdiction in spite of it. This is the question to be determined by the Supreme Court.

Our answer to "(f)" is that if the Court originally had no jurisdiction, there could be no default in the action, and the judgment entered is absolutely void.

Answering "(g)" we would say that anybody, even the Court itself, can raise the question of jurisdiction at any time and place. This is elementary.

At the top of page 12, the brief alleges that the petitioner "had other remedies to protect its "rights, by an appeal or otherwise, if it consid- "ered the question of the jurisdiction of the "Court was *doubtful or depended on facts which "are not made a matter of record.*" We answer, that want of jurisdiction is not, to us, "doubtful" and does not "depend on facts which are not "made a matter of record." They are all set forth in the petition as exhibits.

Of course, want of jurisdiction can be attacked at any time and in any place.

At the bottom of page 12, the Brief says: "The writ of prohibition cannot be granted, as "there is nothing to prohibit the District Judge "from doing."

The suggestion in the Return and the Brief that there is nothing for the Supreme Court to prohibit because a final judgment has been entered, merely begs the question. It is still maintained by the Court that the order of May 29th is in force. If it is in force, it is by reason of the jurisdiction claimed by the Court. The judgment does not execute itself. An execution has to be issued and the property sold. All of this is yet to be done, and this writ of prohibition will apply to all the steps that are usually taken to realize upon an attachment. There is much yet for the Court to do. The ship remains unsold and the claim unpaid. Under the order the ship is to be turned back to the Marshal at some time *in the future.*

The Brief quotes on page 13 from *Ex parte Joins,* 191 U. S., 93. In that case there were "issues of fact in the case upon which the juris- "diction depended."

In this matter there is no disputed question of fact as to whether or not there was jurisdiction. No material allegation of the petition is denied.

The Brief also quotes: "*Where a District* "*Court has jurisdiction* of the premises, a writ "of prohibition will not be issued to restrain it "from proceeding in the exercise of such juris- "diction."

This is of course.

If the District Court had originally jurisdiction by virtue of the attachment of the steamship

Whitney, after she had been requisitioned by the United States Government, and had been taken into the possession of the Sovereign Power, and was then actually in use in war operations, then this petitioner has no right to the remedy requested.

We respectfully suggest that the real points at issue have not been met, i. e.:

1. The Court did not acquire jurisdiction by the original attachment. The mere fact that the steamer happened to be in New York harbor instead of in France did not change its status under the requisition.

2. The Shipping Board, an agent of the Executive, has no power to give the Court jurisdiction by consent in open court or otherwise.

3. The order of May 29th is void on its face and it purports to be still in force, and action is to be taken under it *hereafter* when the ship is to be turned back to the Marshal.

The original attachment being void and the owner never having appeared generally, the judgment is void; and any further proceedings under that judgment by sale or otherwise, or under the void order of May 29h, by delivering back the vessel into the hands of the Marshal or otherwise, will be prohibited.

The writ of prohibition should issue.

Respectfully submitted,

ALEXANDER S. BACON,
Proctor for Petitioner,
No. 46 Cedar Street,
New York City.

Dated, New York City, December 6, 1918.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918.

No. 25, ORIGINAL.

*Ex Parte:*
IN THE MATTER
OF
WHITNEY STEAMBOAT CORPORATION,
Petitioner.

## BRIEF FOR THEODORE A. CRANE'S SONS COMPANY, LIBELLANT AND LIENOR.

On the petition as filed by the Whitney Steamboat Corporation a rule has been granted by this Court directing the District Court of the United States for the Eastern District of New York and Judge Edwin L. Garvin and all the other judges and officers of said Court to show cause on the 9th day of December, 1918, why a writ of prohibition should not issue against them, and each of them, in accord-

ance with the prayer of the said petition (pp. 9 and 10, paragraphs (a) to (g) of Petition).

**Statement.**

The Honorable Edwin L. Garvin, the Judge of the District Court of the United States for the Eastern District of New York, who heard the two applications of the owner of the steamer *H. M. Whitney*, appearing specially through its counsel, Alexander S. Bacon, Esq., and who granted the two orders (Exhibit D, p. 26, and Exhibit F, p. 29, of Petition), will file his return to the said petition and to the rule to show cause, in which he will request that this Honorable Court will deny the writ of prohibition on the petition as filed.

The Honorable District Judge will leave to counsel for Theodore A. Crane's Sons Company and Henry H. Little, Esq., counsel for the United States Shipping Board, the presentation and discussion of the points and propositions of law raised in the said petition.

The following admission is made by the petitioner in its said petition (paragraph 4, p. 3):

> "* * * on and before the 17th day of April, 1918, the said steamship *H. M. Whitney*, her engines, &c., was in the possession and under the control of this petitioner at the City of New York, N. Y., * * * was being repaired and was * * * being loaded preparatory to a trip to Genoa, Italy; * * *"

And the further admission (paragraph 5, p. 3):

> "In the custody and under the control of this petitioner, at said Pier No. 63, the said

> steamship was attached, on April 18th, 1918, in an action brought in said District Court of the United States, Eastern District of New York, entitled 'Patent Vulcanite Roofing Company, Inc., Libellant, against the Steamship *H. M. Whitney*, her engines, &c., Claimant,' and a United States Marshal was put in charge thereof under said attachment."

The said petition (paragraph 6, p. 3) further admits that up to the 29th day of April, 1918, the petitioner was in possession of the said steamship *H. M. Whitney*, when it claims the United States Government requisitioned the said steamship.

While the said steamship *H. M. Whitney* was at Pier 63, New York City, in the Southern District of New York, the proctor for Theodore A. Crane's Sons Company, believing that the said steamship was in the possession of the United States District Court for the Southern District of New York, filed the libel for Theodore A. Crane's Sons Company. It was thereafter discovered that the said steamship was attached under a libel filed in the United States District Court for the Eastern District of New York by the Patent Vulcanite Roofing Company, Inc., and that the United States Marshal for said Eastern District of New York was in possession of the said steamship under said libel. Thereafter, and on or about the 16th day of May, 1918, the libel of Theodore A. Crane's Sons Company against the said steamship *H. M. Whitney*, for its repair bill, was filed in the United States District Court for the Eastern District of New York, and process *in rem* was issued to the said United States Marshal, who was still in possession of the said vessel under the libel filed by the Patent Vulcanite Roofing Company, Inc.

On page 33 of its brief the petitioner says:

> "On April 18, 1918, the Vulcanite Company libelled the SS. *Whitney* and the United States Marshal was put into possession. This attachment is not questioned."

As the said steamship was never bonded or released from the libel of the Patent Vulcanite Roofing Company, Inc., that admission of the petitioner conclusively establishes the fact that the United States District Court for the Eastern District of New York was in possession of and had jurisdiction over the said steamship at the time the United States Government desired the use of the said steamship on April 29, 1918, and that attachment was in full force and effect at the time the said vessel was attached under the said libel filed by Theodore A. Crane's Sons Company, and the said attachment under the said libel of Theodore A. Crane's Sons Company had the same force and effect and was as valid as if the attachment had been made at the same time the said vessel was attached under the libel of the Patent Vulcanite Roofing Company, Inc., as the said District Court still held its possession of and jurisdiction over the said steamship.

If the petitioner desired the possession of the said steamship and desired to litigate the claim of Theodore A. Crane's Sons Company, it could have done so by complying with the rules of the Supreme Court of the United States and the rules of the United States District Court for the Eastern District of New York, in admiralty, by giving the usual stipulation for costs and a stipulation for value, which would have released the said vessel from the possession of the Court and the custody of the United States Marshal, but the petitioner did not do so. In the libel suit brought by the Patent Vul-

canite Roofing Company, Inc., against the said steamship *H. M. Whitney* petitioner filed stipulation for costs and an answer, which, under the practice of the Court, allowed the vessel to remain in the custody of the Court until the final determination of the issues raised by the pleadings.

Admiralty Rule 11 of the Supreme Court of the United States reads as follows:

> "11. In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him, upon a due appraisement to be had, under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of, as it may deem most for the benefit of all concerned."

Rule 17 of the United States District Court for the Eastern District of New York reads as follows:

> "17. Property seized by the Marshal may be released as follows:
>
> First. By giving bond as provided in §941 of the Revised Statutes.
>
> Second. In all suits for sums certain, by paying into court the amount sworn to be due in the libel, with interest computed thereon from the time it was due to the stated term next succeeding the return day of the attachment, and the costs of the officers of the court already accrued, together with the sum of $250, to cover further costs; or by filing an

> approved stipulation for such sworn amount, with interest, costs and damages, conditioned as in the next subdivision stated; and by payment into court of the costs of officers of the court as provided by Rule 20: and in either case the claimant may thereupon have an order entered *instanter* for delivery of the property arrested without appraisement."

On page 41 of its brief the petitioner says:

> "The claim of Crane Bros. Co. *in personam* is against the owners, not the U. S.; and no lien can be obtained by taking over the custody of the steamer out of the hands of the Sovereign."

In reply to that statement, counsel for Theodore A. Crane's Sons Company says that the said steamship was not taken out of the hands of the sovereign, for the sovereign never claimed it had the possession of the said steamhsip, and the United States Government has never claimed that it ousted the District Court from its jurisdiction over the said steamship.

The libel of Theodore A. Crane's Sons Company is filed *in rem* against the said steamship *H. M. Whitney,* and the repairs made to the said steamship constitute a maritime lien against her, and such lien is given to the libellant by the Act of Congress of June 23, 1910 (U. S. Comp. Stat., Supp. 1911, pp. 1191 and 1192), which reads:

> "That any persons furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be

> enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel."

Admiralty Rule 12 of the Supreme Court of the United States reads as follows:

> "12. In all suits by material men for supplies or repairs or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*."

Even if Crane's libel had been filed after a sale of the steamship *H. M. Whitney* under the libel of the Patent Valcanite Roofing Company, Inc., the Crane's libel would still be a subsisting lien against the vessel, and the Court would still have jurisdiction in accordance with Rule 60 of the United States District Court for the Eastern District of New York, which reads:

> "60. In proceedings *in rem*, after a sale of the property under a final decree, claims upon the proceeds of sale, except for seamen's wages, will not be admitted in behalf of lienors filing libels or petitions after the sale, to the prejudice of lienors under libels filed before the sale, but shall be limited to the remnants and surplus."

The order entered on the 29th day of May, 1918 (Exhibit B, p. 22 of Petition), consented to on the bottom thereof by Proctor for Patent Vulcanite Roofing Company, Inc., and Proctor for Theodore A. Crane's Sons Company, and consented to in open court by Henry H. Little, Esq., counsel to the United States Shipping Board, was a valid exercise of the power and right of the Court to hold its original jurisdiction over the steamship *H. M. Whitney*, because the vessel was never released from attach-

ment under the libel filed by the Patent Vulcanite Roofing Company—the first libel—by bonding, and still remains in the custody of the said District Court, through the United States Marshal.

Mr. Alexander S. Bacon, counsel for the petitioner, knew that if, on the return day of the process issued under the libel, the owner did not comply with the rules and practice of the Court by bonding the vessel, the owner's default would be taken and an interlocutory decree, with an order of reference, to prove up the claim of Crane's Sons Company as stated in the libel would be entered, and on the filing of the report of the Commissioner a final decree would be entered directing the sale of the said vessel by the United States Marshal to pay the amount stated in said final decree, and which was done, as shown by Exhibit G, page 31 of the petition.

Petitioner's statement, made on page 7 of its petition, "being for a claim disputed as padded," is answered by its own two surveyors, who had full charge and superintended all the repairs made on the said steamship *H. M. Whitney* by Theodore A. Crane's Sons Company, and who were called as witnesses on the reference to prove the extent of the repairs and the reasonableness of the charges, and they did so to the satisfaction of the Commissioner.

The statements made under Points I and II of petitioner's brief (pp. 35 to 48) to endeavor to show that the Court had no jurisdiction over the steamship *H. M. Whitney* are disposed of by the fact that the United States Government, through the United States Shipping Board, has not in any way interfered with the jurisdiction of the District Court over the steamship *H. M. Whitney,* and does not intend to do so, and has not raised any question

as to the validity of the order of the District Court dated the 29th day of May, 1918 (Exhibit B, p. 22 of Petition). The Government still stands upon that order, being perfectly satisfied with the terms thereof.

In the case of *The Florence H.*, 248 Fed., 1012, at page 1017, the Court said:

> "If the cause is to be stayed for such reasons, the most obvious proprieties demand that the suggestion shall arise from the only source to which the Court has any right to look."

The Court means that the Secretary of State or the Shipping Board, through the Emergency Fleet Corporation, would be the only parties having the right to claim that the Court has no jurisdiction over the steamship and to enforce its mandates or decree.

The libellant answers the "Questions Raised, Directly or Indirectly," on page 9 of the petition herein, as follows:

> (a) A vessel can be libelled when in the possession of the sovereign power and used exclusively in operation of war when the Court has—as in this case of the steamship *H. M. Whitney*—jurisdiction over the vessel when the sovereign power takes tentative possession of the vessel. The steamship *H. M. Whitney* was taken with the tentative and conditional consent of the libellants, whose libels were valid and subsisting libels against the said vessel; and the Court does acquire jurisdiction *in rem* by virtue of such attachment.

(b) The requisition of the sovereig[n] power did not deprive the Marshal (the Court[] of the custody of the steamer *H. M. Whitney.*

As to depriving the owner of the cu[stody of] the steamer: the owner, the petitioner[ was in] default, as it did not appear on the re[turn of] the process *in rem,* and did not release [the ves-] sel by giving a stipulation for value [or bond] in accordance with the Admiralty Rule[s of the] Supreme Court of the United States [and the] rules of the United States District C[ourt for] the Eastern District of New York, [and the] owner, the petitioner, being in default [and not] claiming the steamer as the owner [thereof,] has no control over or rights in the sai[l vessel.]

(c) An executive agency of the Gov[ernment] (the Shipping Board) can confer juri[sdiction] on the Court by consenting to or mo[ving for] the entry of an order made without n[otice to] the owner.

(d) The order of May 29th, 1918 [is not] void.

(e) The order of May 29th, 1918, [was not] necessary to grant any jurisdiction [to the] Court, as the Court already had juri[sdiction] over the steamer, and the order of M[ay 29th,] 1918, did not in any way by its terms [intimate] that the Court did not have jurisdict[ion, and] the United States Government, thro[ugh the] United States Shipping Board, ackno[wledged] that the Court did have jurisdiction [over the] said steamer *H. M. Whitney.*

(f) The Court had the power to enter judgment or final decree by default against the said vessel and her owners, for the reasons stated in this brief, to wit: that the owner defaulted on the return of the process and did not comply with the Admiralty Rules of the Supreme Court of the United States and the rules of the United States District Court for the Eastern District of New York, which gave the owner the right to release its steamship from the first libel and the libel of Theodore A. Crane's Sons Company, if it so desired. The petitioner, as owner of the said steamship, is still in default and is, therefore, without standing before this Honorable Court to make this application for a writ of prohibition.

(g) The owner of the said steamship, the petitioner herein, has no standing in this Honorable Court to raise the question of jurisdiction, for the reasons previously stated herein. Furthermore, the United States Government, through the United States Shipping Board, does not raise the question of the jurisdiction of the Court over the steamer.

It is respectfully submitted that the order to show cause why the writ of prohibition should not issue against the District Court of the United States for the Eastern District of New York and the Honorable Edwin L. Garvin and all the other judges and officers of said Court should be denied on the following grounds:

1. The District Court had jurisdiction over the steamship *H. M. Whitney* by the filing of the libel of the Patent Vulcanite Roofing Com-

pany, Inc., and was in possession of the said steamship at the time the libel of Theodore A. Crane's Sons Company was filed. The petitioner had another remedy to protect its rights, if it desired to do so, by an appeal or otherwise, if it considered the question of the jurisdiction of the Court was doubtful or depended on facts which are not made a matter of record.

2. On the default of the owner of the said steamship in this case an interlocutory decree was entered herein, the claim was thereafter proven before the Commissioner appointed therein by the Court, and on the filing of the report of the said Commissioner, in conformity with the rules of the Court, a final decree was entered in the case of Theodore A. Crane's Sons Company against the steamship *H. M. Whitney* on August 16th, 1918, in favor of the libellant, Theodore A. Crane's Sons Company, for the sum of $260,139.28, made up as follows: Claim for repairs and interest, $258,713.14, and costs of Court and Marshal's fees of $1,426.43 (see Exhibit G, p. 31 of Petition).

As the final decree was entered herein on the 16th day of August, 1918, and as the District Judge had done all that could be done by a District Court in said action before the order to show cause had been served on the Honorable Edwin L. Garvin, one of the Judges of the District Court of the United States for the Eastern District of New York, the writ of prohibition cannot be granted, as there is nothing to prohibit the District Judge from doing.

See the following cases:

*In re Rice, Petitioner*, 155 U. S., p. 396.
*In re New York & Porto Rico Steamship Company, Petitioner*, 155 U. S., p. 523.

In the case of *United States* v. *Hoffman*, 4 Wall., 158, at page 161, the Court said:

> "The Writ of Prohibition can only be issued to prevent the doing of some act about to be done, and can never be used as a remedy for acts already completed."

To the same effect is the case of *Ex Parte Joins*, 191 U. S., 93, citing and affirming the case of *United States* v. *Hoffman, supra*.

It has also been held:

> "One who intervened in a salvage suit after the vessel had been sold, objecting to the jurisdiction on the ground that she had been seized by the marshal of another district, under a libel filed by himself, is not entitled, on the overruling of his objections, to a writ of prohibition from the Supreme Court, there being issues of fact in the case upon which the jurisdiction depended. *In re Alix*, 17 S. Ct., 522; 166 U. S., 136; 41 L. Ed., 948."

And:

> "Where a District Court has jurisdiction of the premises, a Writ of Prohibition will not be issued to restrain it from proceeding in the exercise of such jurisdiction. *Morrison* v. *District Court for Southern District of New York*, 13 S. Ct., 246; 147 U. S., 14; 37 L. Ed., 60; *Same* v. *District Court for District of Massachusetts, Id.*"

It is respectfully submitted that the order to show cause why the writ of prohibition should not issue should be denied, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

GEORGE W. McKENZIE,
Proctor for Theodore A. Crane's
Sons Company, Libellant.

PETER S. CARTER,
Of Counsel.